IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1061

WINDWARD SHIPPING (LONDON) LIMITED, et al,
Petitioners,

v.

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al,
Respondents.

On a Petition For a Writ of Certiorari To The Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas

BRIEF ON BEHALF OF THE WEST GULF MARITIME ASSOCIATION, INC., THE NEW ORLEANS STEAMSHIP ASSOCIATION, INC., THE TAMPA MARITIME ASSOCIATION, THE PENSACOLA STEAMSHIP ASSOCIATION, AND THE SAVANNAH MARITIME ASSOCIATION AS AMICI CURIAE

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To The Honorable Judges of Said Court:

CONSENT OF PARTIES

All of the parties in this case have given their written consent to the filing of this brief and such written consents have been filed with the Clerk.

STATEMENT OF INTEREST

The interests of the *amici curiae* appearing through this brief are described as follows:

A. The West Gulf Maritime Association, Inc., (hereafter West Gulf) is a non-profit corporate entity whose members (approximately 50 in number) constitute virtually all of the owners, ship agents, and stevedores concerned with the operations of vessels calling in all of the ports in the State of Texas, i.e., Houston, Galveston, Orange, Beaumont, Port Arthur, Freeport, Corpus Christi, and Brownsville, and the Port of Lake Charles, Louisiana. The West Gulf members may be fairly characterized as those firms which as owners, or as representatives of, or contractors with, owners or charterers of vessels, are involved in obtaining cargo for such vessels, arranging for their entry, clearance, and departure, providing stevedoring services, including the employment and utilization of longshoremen, and, in general, attracting, facilitating, and making possible the operations of all deep sea vessels calling at the ports described. The membership of West Gulf includes owners of United States flag vessels, owners and/or operators of foreign flag vessels, and agents servicing both United States and foreign flag vessels. The membership also includes stevedores who contract for the loading and/or discharging of ships, regardless of flag, in the Texas ports and Lake Charles, Louisiana. West Gulf members employ and utilize United States longshoremen in all cargo operations. It is to be noted that many of the members do not per-

form all of the foregoing services, but all of the members provide at least some of them. There are United States flag owners who are members. There are agents who are members and are charged with responsibility of soliciting cargos from United States exporters and arranging for their shipment to foreign ports as well as arranging for the discharge of foreign cargos from Texas ports and Lake Charles, Louisiana, to the United States. There are stevedore members whose activities are limited to the specific responsibility of loading and discharging vessels under specific contracts at specific ports. We feel it important that, despite the diversity of interests which one would assume might appear in such an Association, West Gulf is unanimously in accord that if the decision below is allowed to stand, disastrous ramifications can be anticipated not only by owners and operators of foreign vessels but by all of the members of West Gulf and their employees, including the thousands of longshoremen whose livelihood has for so many years been dependent upon a full and free flow of international commerce in and out of the ports involved.

B. The New Orleans Steamship Association is in all respects similar to West Gulf except that its members (approximately 50 in number) consist of owners, agents, and stevedores operating in that very major port. It would serve no purpose to reiterate the considerations set out above with respect to West Gulf, but it is, we believe, essential for the Court to realize that, while the instant case arises from Texas, the effect of the decision of the Court

of Civil Appeals, if affirmed, would necessarily affect the great and traditional port of New Orleans to a degree equal, if not greater than, that which would be experienced by the ports of West Gulf.

C. The ports of Tampa, Pensacola, and Savannah are represented herein by the aforenamed Associations whose members operate in those ports. Once again, these Associations are similarly constituted and are placed in the same potential jeopardy as the other amici in whose behalf this brief is filed.

In short, we feel it accurate to state that a very large majority of the functional maritime interests from Cape Hatteras, North Carolina, to Brownsville, Texas, are represented in this brief, with the exception of the port of Mobile, Alabama, which has filed a separate brief *amicus curiae* which is appropriate because a decision of the Supreme Court of Alabama in a related case will probably be the subject of a later petition for certiorari.

We think it extremely important to emphasize that in the membership of all of these Associations, both United States and foreign registry interests are involved. In the short run, a question might occur as to why the owners, agents and/or stevedores of American flag vessels would seek reversal of the decision. We think it clear, as we will discuss in more detail below, that the belief of the United States shipping interests is that, in the long range view, whatever problems arise between United States shipping interests and those of foreign flags, the resolution of the problem must be made either by competitive factors, given the maritime policies of the countries involved, or, at the very least, must be determined by agencies or entities within the government of the United States having

the overall economic and diplomatic expertise to negotiate, balance and set a course for the optimum utilization of this country's manufacturing, agricultural, producing, transporting, and shipping industries and all of the employees involved therein. It is our opinion, with all respect, that the National Labor Relations Board is simply not equipped to perform that function.

It is for this reason that these Associations, whose members have divergent interests, domestic and foreign, and are in a highly competitive position with each other, nonetheless feel that a decision of an intermediate appellate court in the State of Texas, however well intentioned, should not be allowed to stand, especially where it simply leaves the parties to such recourse as they may gain from the National Labor Relations Board which, once again with respect, we feel is an inappropriate ruling body.

ARGUMENT

The specific case before the Court involves two vessels which were effectively prevented from discharging cargo at the Port of Houston, Texas. It is clear from the record that there was another case in Houston, the resolution of which was deferred pending the outcome of the instant litigation. The picketing efforts of the respondent unions also reached and had effect in the Port of Galveston, Texas, where the Galveston Wharves (that Port's publicly owned authority) sought and obtained a temporary restraining order in Cause No. 109,867, *The City of Galveston v. International Organization of Masters, Mates & Pilots, et al*, in the District Court of Galveston County, Texas, Tenth Judicial District. Subsequently the determination of that cause was, pursuant to agreement with coun-

sel for respondents here, deferred pending a final resolution of the case now before this Court.

In the Port of New Orleans similar picketing efforts were successful in causing work stoppages until restrained by a State District Court there. An appeal was taken (by counsel who represent respondents here) and, while the order granting the temporary restraining order was reversed, the Louisiana appellate courts based their action solely upon overly broad provisions of the injunction under Louisiana law. See *Allied Navigation Co., et al v. Int'l Assn. of Masters, Mates & Pilots, et al,* 272 So. 2d 23, writ denied, 275 So.2d 871 (1973).

As stated above, the same type of picketing affected the Port of Mobile, Alabama. The troubles there undoubtedly will be discussed in the *amicus curiae* brief to be filed by The Mobile Steamship Association.

In addition, as the record in this case will show, not only the owners of the vessels involved were affected. Charterers, including specifically here a Japanese corporation, Toko Kisha, intervened, alleging that it was sustaining irreparable injury because of the inability to work the ship. As counsel for those charterers indicated, his client's interests were involved and, as anyone remotely familiar with the industry knows, quite often the owner of the vessel has much less at stake because of a work stoppage than the charterer who actually has undertaken to deliver or receive cargo exported or imported through United States ports.

The point which we think should be recognized at this stage is that the activity admittedly conducted by the respondents for the purpose of persuading organizations not to allow the loading and discharging of foreign flag

vessels at ports in the United States had far-reaching effects upon the members of the Associations appearing through this brief, their employees, and American and foreign growers, producers, importers and exporters, as well as the various port authorities (most of which are publicly owned) whose revenues depend upon a free flow of ocean trade across their docks.

As we see the role of *amici curiae*, there is no reason for us to burden the Court with an extensive analysis of the specific factual and legal issues which will be briefed and presented by the parties to the litigation. The primary justification for our appearance is to indicate the potentially broader scope of involvement in any decision which this Court might render than can be shown by the parties alone. However, we do feel justified in making a very summary statement of what we consider to be the basic reasons for a reversal of the decision below.

With deference, we submit that the Court below, while specifically limiting its decision to the conclusion that the trial court's jurisdiction was preempted by that of the National Labor Relations Board, nonetheless tended to confuse the question of preemption with prior decisions construing the Norris LaGuardia Act (29 U.S.C. 101, et. seq.). The two concepts we feel were additionally clouded by prior intermediate Federal court holdings concerning the propriety of remanding an action solely for injunctive relief originally filed in a state court where the Federal court, if it assumed jurisdiction, could do nothing but dismiss the sought for injunctive relief because of the proscriptions imposed upon Federal courts by the Norris LaGuardia Act. We think the remand questions are simply (1) whether the Federal court has any jurisdiction if it cannot grant the remedy prayed for

and (2) if not, whether the Federal court should take it upon itself to determine the preemption question for the state court. (The case here, incidentally was removed to, and remanded by, the United States District Court for the Southern District of Texas.)

In any event, regardless of any previous "Norris La-Guardia," "preemption," "removal and remand" confusion, the Court now clearly has before it only the question of preemption. Such preemption arises only in a case concerning activity argueably protected or prohibited by the National Labor Relations Act (29 U.S.C. 151, et. seq.). We think it extremely important to recall just why this Court felt that it was necessary to create such a preemption area in matters involving those prohibited or protected activities.

We believe that a fair reading of cases such as *Garner v. Teamsters,* 346 U.S. 485 (1957), and *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 136 (1959) leads inevitably to the conclusion that the Court felt that the National Labor Relations Board should have entrusted to it exclusive and preemptive jurisdiction over cases which it could properly and effectively investigate, concerning parties against whom it could file complaints and notices and require to appear at hearings; cases involving issues which it had experience and expertise in handling, and which required decisions it could fashion realistic remedies to implement. In labor disputes involving interstate commerce, this is settled law. However, this Court has long ago recognized that nothing in the composition, expertise, authority or functioning of the National Labor Relations Board indicates that it should exercise jurisdiction in cases where pickets are preventing the loading and discharging of foreign flag vessels at ports

of the United States solely because they feel that if such vessels are driven away from our ports, United States vessels might be used in greater numbers. This we feel was the rationale of *Benz v. Compania Naviera Hidalgo,* 353 U.S. 138 (1957); *McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10 (1963); and *Incres Steamship Co. v. Int'l Maritime Workers Union,* 372 U.S. 24 (1963).

These *amici* respectfully but urgently ask the Court to recognize that the entire constitution and procedural scheme of the National Labor Relations Board is simply not and never was intended to be geared to determine if and to what extent foreign flag vessels, despite treaties of mutual friendship with the United States, should be denied the protection of our courts at the ports in which they call, or to sanction or prevent the free and non-discriminatory flow of commerce to and from their holds.

The Court below attempted a very technical distinction between what it felt were "internal" and "operational" affairs of the vessels in question. As *amici* we will leave this excursion in semantics to the parties involved, but we ask that the Court in effect stand back and not become too deeply emeshed in it. The fact is that if the respondent unions are allowed to picket and drive away foreign vessels with no effective judicial recourse available to any parties, foreign or domestic, wishing to ship or receive cargo, load or import the same, or to manufacture, harvest or process commodities for international movement, a sad day has come to this nation as a participant in international water-borne commerce.

We are, of course, aware of this Court's decision in *AFL-CIO v. Ariadne Steamship Co., Limited,* 397 U.S.

195 (1970), but find it of no application here. The record in this case is clear that the respondents were not attempting to obtain employment *by* the owners, charterers, or operators of foreign flag vessels of citizens of this country as was the real object of the picketing in *Ariadne*. Rather, the respondents here have used the well recognized sanction of the picket line to effect and enforce their concepts of the proper role of the United States in foreign commerce. We respectfully submit that such determinations lie with the Congress and the Executive Department of our government rather than the respondents. We further submit that the Congress did not intend, as this Court has on previous occasions held, that the National Labor Relations Board was to become involved in matters involving the internal affairs of foreign governments, employers, and crewmembers, much less the extremely complicated diplomatic and economic issues relative to our country's trade relations with other nations.

The respondents cannot go both ways. If they were engaged in a labor activity which, if domestic, would be protected or prohibited by the National Labor Relations Act and therefore exclusively under the jurisdiction of the National Labor Relations Board, this Court's decisions in *Benz*, *McCulloch*, and *Incres*, supra, rule clearly that there is no Board jurisdiction and therefore no preemption. If, on the other hand, the respondents take the position that their picketing is for any purpose *other* than furthering an interest protected or prohibited by the National Labor Relations Act, then by definition it is not an activity which the courts of the State of Texas are preempted from considering and judicially controlling in such manner as is legally appropriate.

CONCLUSION

The *amici* represented herein respectfully urge the Court to reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing brief have been served on counsel for all parties herein by depositing the same in a United States mail box with first class postage prepaid, addressed to counsel of record at the following post office addresses on the 16th day of August, 1973:

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